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June 5, 2000

BY HAND DELIVERY

Honorable Vernon L. Williams
Surface Transportation Board
Case Control Unit
Attn: STB Ex Parte No. 582 (Sub-No. 1)
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Ex Parte No. 582 (Sub-No. 1),
Major Rail Consolidation Procedures

Dear Mr. Williams:

Enclosed for filing in the above-referenced proceeding are the original and 25 copies of the Joint Reply Comments of Subscribing Coal Shippers. Also enclosed is a 3.5-inch diskette containing the text of the Joint Reply Comments in WordPerfect format.

Please acknowledge receipt of the enclosed by stamping and returning to our messenger the enclosed duplicate of this letter.

Sincerely,

John H. LeSeur
An Attorney for Subscribing
Coal Shippers

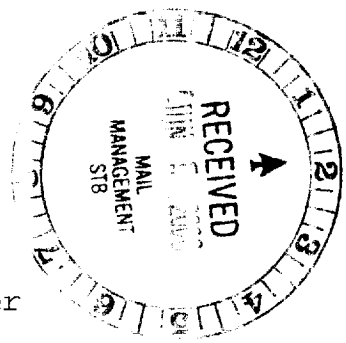
JHL:mfw
Enclosures

cc: Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

MAJOR RAIL CONSOLIDATION PROCEDURES	)	Ex Parte No. 582 (Sub-No. 1)

JOINT REPLY COMMENTS OF SUBSCRIBING COAL SHIPPERS: WESTERN COAL TRAFFIC LEAGUE, AMERICAN PUBLIC POWER ASSOCIATION, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, ALLIANT ENERGY CORPORATION, CENTRAL AND SOUTH WEST SERVICES, INC., CITY OF GRAND ISLAND, NEBRASKA, CITY UTILITIES OF SPRINGFIELD, MISSOURI, LAFAYETTE UTILITIES SYSTEM, NORTHERN STATES POWER COMPANY, PLATTE RIVER POWER AUTHORITY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT and TEXAS MUNICIPAL POWER AGENCY



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Dated: June 5, 2000

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SURFACE TRANSPORTATION BOARD

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PREFACE AND SUMMARY

Subscribing Coal Shippers ("Coal Shippers") appreciate the opportunity to file reply comments in this proceeding. We have reviewed the many comments filed by shippers, railroads and other interested parties.[1] As discussed herein, virtually all shipper commentors support the principles embodied in the

[1] Unless otherwise indicated, all references herein to party comments are to Opening Comments and Verified Statements ("V.S.") filed by parties in response to the Board's Advance Notice of Proposed Rulemaking, served in this docket on March 31, 2000.

conditions and policies Coal Shippers advocated in our Opening Comments -- merging carriers should be required to make customers whole for merger-caused service failures; no new mergers should be approved without pro-competitive conditions being attached; and shippers should not be forced to bear the cost of acquisition premiums and merger-caused service failures.

The Class I railroad industry, on the other hand, generally opposes shipper-endorsed rail merger policy changes. The industry wants to maintain the status quo and, where change is advocated, it consists principally of marginal changes in the Board's current merger rules (e.g., submitting additional evidence on service issues).

The Board has stated that "fundamental change" is needed in its merger rules. Coal Shippers advocate such changes; the rail industry (not surprisingly) does not. We urge the Board to make the fundamental changes we advocated in our Opening Comments.

I.

OVERVIEW

As the Board has candidly acknowledged, the recent round of Board-approved rail mergers has severely hurt the shipping public:

> In the past five years, the railroad industry in the United States underwent several mergers involving the nation's largest railroads, with the result that now only four

> large railroads remain -- two in the West and two in the East. Unfortunately, with those mergers came severe service disruptions that have cost shippers nationwide hundreds of millions of dollars in lost freight or delayed shipments, and, again unfortunately, many of those problems persist even to this day.
>
> * * *
>
> The well-publicized service crisis that developed shortly after approval of the UP/SP merger cost American business (including both railroads and their customers) hundreds of millions of dollars and crippled railroad activities throughout the United States for nearly a year. The subsequent service problems following the Conrail division "threatened to bring parts of rail service in the East to a standstill" and "cost corporate shippers millions [of dollars] in delays." The problems with the BN/SF merger, while less publicized, were also substantial, even though, as pointed out by several shippers and shipper groups, . . . that merger was considered to be largely an "end to end" combination that presumably would not create such difficulties. And even the CN/IC merger, which is not yet fully implemented, and as to which the jury is thus still out . . . , has not left all shippers satisfied.

Brief of Respondent Surface Transportation Board, No. 00-1115, et al., Western Coal Traffic League v. STB (D.C. Cir., filed May 19, 2000), at 4, 10-11 (footnotes omitted) ("STB Moratorium Case Brief").

Not only have prior mergers caused irreparable injury to the shipping public, the Board-approved mergers have led to an industry that is so concentrated that the "next round" of mergers, if approved, will produce a national rail duopoly --

putting control of most American rail freight in the hands of two mega-carriers.

In light of these developments, the Board has wisely concluded that "the Board's existing merger policies and procedures -- as reflected in its rules, policies, and precedents -- are inadequate to deal with any new merger proposals, and . . . fundamental changes to federal regulation are required to address any further mergers." (STB Moratorium Case Brief at 4) (emphasis added).[2]

Shippers participating in this proceeding have proposed fundamental changes in the Board's merger rules. While the details of various shipper-sponsored proposals differ, the shipping community's comments uniformly support proposals of the type forwarded by Coal Shippers in its Opening Comments:

* Shippers uniformly support requiring merging carriers to reimburse shippers for extra costs resulting from merger-caused service disruptions;

* Shippers uniformly support changes that will increase shippers' competitive options in the form of increased bottleneck and competitive access relief;

* Shippers, joined by short line railroads, uniformly support removing

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[2] Such changes can be made in a rulemaking proceeding, like the instant one, or in the adjudication of an individual case, or both.

anti-competitive paper barriers that prevent short lines from competing for traffic;

* Shippers uniformly support excluding acquisition premiums and merger congestion costs from costs used in rate cases and in calculating the RCAF; and

* Shippers uniformly support policy changes requiring mergers to be granted only if the merger enhances, rather than simply preserves, pre-merger competition and policy changes requiring the STB to consider "downstream" merger impacts.

Unfortunately, the major Class I railroads (hereinafter referred to as the railroad industry) have not listened to the Board. The railroad industry, led by its trade association the Association of American Railroads ("AAR"), generally takes the position that "[t]he Board should . . . guard against efforts to use this proceeding as a forum for promoting changes in regulatory philosophy." AAR Comments at 8. Thus, the railroad industry generally rejects all shipper-sponsored proposals to increase competition or to provide meaningful remedies for service failures.

The industry does dutifully talk about "rais[ing] the bar" for STB merger approvals (see, e.g., CSX Corp. Comments at 7), but "raising the bar" in railroad-speak generally means inundating the Board, and the parties, with even more filings and evidence to support a merger transaction. The current merger approval process is already a paper intensive exercise. In

recent merger cases, the merging carriers have presented reams of evidence that attempts to predict the future in such areas as post-merger service, post-merger cost reductions, etc. Numerous carrier-sponsored and in-house witnesses, experts, attorneys, etc. have presented glowing pictures of the future with respect to every merger. The Board has generally accepted and based its approval decisions on this evidence. Predicting the future, however, is not easy and even the industry itself admits "[t]here is no doubt that current rail management, that of NS included, failed to deliver many of its claimed merger benefits." Norfolk Southern Comments, V.S. McClellan at 11.

Coal Shippers certainly do not object to the Board's consideration of proposals that, if accepted, will allow the Board to better predict the potential impact of rail mergers, or will increase evidentiary burdens of proof on applicant rail carriers. However, Coal Shippers submit that the industry's "more paper" type proposals will, in the end, not significantly help the STB predict the future, nor do they address the critical service and competition issues at stake in merger cases.

What is needed, as the Board has aptly described it, is "fundamental" change. That is the change advocated by the shipping and short line communities and we urge the Board to reject the railroad industry's defense of the status quo, and to

adopt changes advocated by the shipping and short line communities.

II.

THE STB HAS BROAD STATUTORY AUTHORITY TO IMPOSE MERGER CONDITIONS

Before turning to the specific rules advocated by Coal Shippers, a preliminary issue needs to be addressed: the STB's power to condition rail mergers.

The railroad industry contends at various points in its filings that the STB lacks the statutory authority to use its merger approval authority to adopt service and competition rules of the type advocated by Coal Shippers and other shipper/short line commentors.[3] This view is wrong.

Coal Shippers' proposed rules are in the form of STB-imposed conditions on rail mergers. Congress has granted the STB "broad authority" to impose merger conditions.[4] Specifically, 49 U.S.C. § 11324(c) grants to the STB the express power to authorize any conditions it finds to be in the public interest,

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[3] See, e.g., Comments of Canadian National Railway Company at 30 ("CN does not believe that the Board should or could legally use its conditioning power to increase competition").

[4] See Grainbelt Corp. v. STB, 109 F.3d 794, 796 (D.C. Cir. 1997); CSX Corp. -- Control and Operating Leases/Agreements -- Conrail, Inc., STB Finance Docket No. 33388 (Decision served July 23, 1998), slip op. at 78.

including the ordering of "access" rights, divestiture and related forms of regulatory relief:

> The Board shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Board may impose conditions governing the transaction, including the divestiture of parallel tracks or requiring the granting of trackage rights and access to other facilities.

The STB's "broad authority" to condition mergers clearly encompasses the legal authority to impose the conditions proposed by Coal Shippers, since this "broad authority" specifically includes the power to prescribe conditions that "enhance competition" and to prescribe conditions that "compensate" parties for financial losses resulting from a rail merger. Burlington Northern, Inc. -- Control and Merger -- St. Louis-San Francisco Ry., 360 I.C.C. 784, 950 (1980) ("BN-Frisco").

Coal Shippers recognize that the conditions we request will require the STB to change its current construction of the statutory "public interest" standard. However, as cases like BN-Frisco demonstrate, the Board has the statutory authority to make such changes when necessary to address changed transportation circumstances.[5]

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[5] Accord Chicago and North Western Ry. -- Merger -- Chicago Great Western Ry., 330 I.C.C. 13, 31 (1967) (the "public interest" standard is designed to be "elastic," not static, and (continued...)

III.

THE SERVICE CONDITION

In our Opening Comments, Coal Shippers asked the STB to adopt the following service condition:

> The Board will impose as a condition on any major rail consolidation transaction a requirement that the consolidated carrier(s) make any shipper financially whole for any injuries the shipper incurs as a result of post-consolidation service problems. The shipper may submit a claim to a carrier for compensation under this regulation at any time following the Board's approval of the consolidation. The consolidated carrier shall pay the claim within fourteen (14) days of its receipt of the shipper's claim; provided, however, if the carrier disputes the claim, it shall so notify the claimant in writing and explain therein, with specificity, the basis for its dispute, within fourteen (14) days of its receipt of the shipper's claim. If the consolidated carrier so disputes a shipper's claim, the shipper may institute a proceeding at the Board to obtain payment. The Board shall complete any proceeding under this rule within one hundred eighty (180) days after the filing of the request for relief. A consolidated carrier may not raise as a defense that its liability to any shipper is limited by the terms of any contract or other arrangement with the shipper. This section shall apply to all major consolidation transactions approved on or after January 1, 1996.

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[5] (...continued)
is "as broad as are the requirements for transportation in terms of general and specific needs -- of individual shippers and travellers, communities, the Nation and people in general").

Many other shippers proposed similar forms of service conditions, which call for merging railroads to pay shippers for losses that they incur as a result of post-merger service problems.

Significantly, shippers are joined on this issue by the United States Department of Agriculture, which concluded:

> The Board should require that railroads involved in major railroad consolidations indemnify shippers and other railroads (during the merger implementation period) for costs incurred due to merger-related service interruptions . . . .

U.S. Department of Agriculture Comments at 24. The United States Department of Transportation ("DOT") also recommended that shippers obtain "recovery of losses" they incur when railroads fail to live up to service guarantees. DOT Comments at 9.[6]

The American Short Line and Regional Railroad Association ("Short Line Association") urges similar relief for its membership, asking the STB to adopt the principle that:

> Class II and class III railroads that connect to the consolidated carrier have the right to compensation by the consolidated carrier for service failures related to the consolidation.

Short Line Association Comments at 7.

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[6] DOT advocated that such guarantees be included in "contractual agreements" between shippers and merging carriers. Id. The problem with this approach is that it assumes the merging carriers will voluntarily enter into such contract arrangements, a result that is most unlikely given the industry's articulated position in this proceeding.

The railroad industry, with the exception of the Union Pacific Railroad Company ("UP"), either ignores or opposes service failure compensation conditions. For example, NS argues that "[e]xisting procedures" are sufficient to deal with service damages and that the Board lacks the "resources" to administer a service remedy. NS Comments at 23.

"Existing procedures" are not sufficient. Commentor after commentor in this proceeding has demonstrated that "existing procedures" (either court cases or negotiations with the merging carriers) simply have not worked or are too expensive to pursue.[7] The Board needs to adopt rules to address these matters, particularly in light of its recognition that Board-approved mergers have already cost the shipping public hundreds of millions of dollars in congestion-related damages.

The "resources" point is also wrong. If the Board has the "resources" to address and adjudicate multi-billion dollar merger applications, it also has the resources to address and adjudicate rail service complaints. The Board's function, ultimately, is to protect the shipping public and this function is paramount to all others. Moreover, as a practical matter, if

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[7] See, e.g., Comments of the Dow Chemical Co. at 14; Statement of Timothy A. Wolfe, Executive Vice President, Wyandot Dolomite, Inc. at 5; Northwest Forestry Ass'n letter at 2; Proctor & Gamble letter at 3; Comments of National Grain and Feed Ass'n at 3-4; Comments of the U.S. Clay Producers Traffic Ass'n, Inc. at 3-4; Statement of Randall William Stoehr, Heppner Iron and Metal Co. at 4.

carriers and shippers know that the Board has adopted a service failure damage remedy, and stands ready to adjudicate claims, shippers and carriers should be able to promptly negotiate and resolve, amongst themselves, service failure damage issues.

To its credit, the UP has broken ranks with its industry brethren and at least acknowledged that, in certain instances in "future mergers," shippers should be able to obtain a Board-ordered damage recovery for "substitute transportation costs." UP Comments at 6.

However, UP's approach is not the answer for several reasons. Not surprisingly, UP's proposal applies to future mergers while Public Enemy No. 1 for merger-caused service problems was its own merger with SP. Any damages rules should apply to the UP/SP merger and the Conrail acquisition since issues concerning damage recoveries remain outstanding as a result of these transactions.

Next, the UP proposed establishing a complex data base procedure requiring merging carriers to compile cycle time (and other data) both before and after the merger. Coal Shippers submit that this exercise will be skewed in favor of the parties preparing the data -- the merging carriers. Proof of service failures is best left to case-by-case adjudication (e.g., the "proof" of service failure in a unit coal train case may be far different than the proof in a TOFC/COFC case). UP's proposal

also provides no remedy unless service has deteriorated by 50% or more from pre-merger levels. This is an absurdly high threshold and would eliminate many legitimate service claims.

Finally, UP's proposal is limited to the costs of "substitute transportation costs." This limitation effectively precludes relief for most coal shippers who, as we discussed in our Opening Comments, cannot access a second transportation carrier.

Coal Shippers submit that the Board should adopt the simpler service compensation condition we propose. This condition will require carriers to compensate shippers for any costs incurred when they fail to adhere to their service promises in STB merger cases. We also submit that this remedy will do more than anything else to help prevent post-merger service failures since merging carriers will have a strong financial incentive not to allow service problems to occur.

IV.

THE COMPETITION CONDITIONS

Subscribing Coal Shippers proposed conditions for access relief, bottleneck relief and paper barrier relief. We append a copy of these conditions in Attachment A hereto for the Board's convenient reference.

As noted above, shipper parties generally support pro-competitive conditions of the type proposed by Coal Shippers. The railroad industry, on the other hand, generally opposes any form of merger-related relief that would alter the Board's current merger rules to enhance post-merger rail competition. Thus, the Board is faced with a clear policy choice. It can supervise the creation of a rail duopoly that purports to "preserve" pre-duopoly competition, or it can affirmatively act to approve any future mergers only if the applicants are willing to accept competition-enhancing conditions.

Coal Shippers, and other shippers, have presented the Board several competition-enhancing proposals. The railroad industry does not dispute that such conditions will increase competition (as much as such competition can be enhanced given the existing rail duopolies in the east and west), but argues, as it has in the past, that any increase in competition will bankrupt the rail industry. As Coal Shippers explained in our Opening Comments, increasing competition will not hurt the rail industry, it will help it. Moreover, as several commentors have noted, mergers in other industries have been accomplished by regulatory orders directing the merged parties to open up their facilities to competition.[8]

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[8] See, e.g., Comments of Williams Energy Services, V.S. O'Connor at 64-72; Comments of the Chemical Manufacturers (continued...)

In the past, the Board has resisted implementing any competition-enhancing relief, either in or outside the merger context. The Board has ordered no shipper-requested competitive access relief in nearly twenty years. The Board's Bottleneck Decision[9] also has failed because the rail industry refuses to provide shippers with qualifying contracts. This proceeding -- instituted because a crisis exists in the rail industry -- offers the Board the opportunity to infuse some degree of new competition in an industry that is already intensely concentrated. Coal Shippers urge the Board to adhere to its own representations and make, as we request, "fundamental" pro-competitive changes to its merger rules.[10]

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[8] (...continued)
Association and the American Plastics Council, V.S. McCormick at 26-41; Comments of the Port of Seattle, et al. at 5-6.

[9] Central Power & Light Co. v. Southern Pacific Transportation Co., Docket No. 41242, et al. (Decision served Dec. 31, 1996), clarified (Decision served Apr. 30, 1997).

[10] UP proposes a bottleneck rule that is intended to "preserve the shipper's pre-merger options." UP Comments at 12. Preservation of "pre-merger options" is generally available under the Board's current merger rules. In addition, as part of its proposal, UP asks the STB to overrule its decision in Minnesota Power, Inc. v. Duluth, Missabe & Iron Range Ry., STB Docket No. 42038 (Decision served July 8, 1999). This decision should not be overturned as it correctly defines the relevant market, for market dominance purposes, in bottleneck rate cases.

V.

THE REGULATORY COST CONDITION

Coal Shippers have proposed the following regulatory cost relief rule:

> The Board shall impose as a condition on any major rail consolidation transaction the following regulatory cost relief:
>
> (a) In any proceeding at the Board involving development or use of a consolidated carrier's costs for providing rail transportation service, costs associated with rail service problems, or purchase premiums paid for a carrier's assets, shall be excluded from the carrier's cost of service under the Board's General Purpose Costing Systems. "Purchase premium," as used in this paragraph, refers to the difference between the net book value and the purchase price of the involved rail properties. This section shall apply to all major consolidation transactions approved on or after January 1, 1996.

Coal Shippers' proposed regulatory cost relief rule is intended to prevent a consolidated carrier from passing through increased costs in the form of service disruption costs, and purchase premiums, to shippers via the inclusion of these costs in the Board's General Purpose Costing Systems (e.g., the Uniform Railroad Costing System) and in its calculation of the RCAF. Most shipper commentors support the principles codified in the Coal Shippers' proposals.[11]

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[11] See, e.g., Comments Submitted by The National Industrial Transportation League at 18; Comments of U.S. Clay (continued...)

Coal Shippers recognize that prior Board decisions have refused to adopt the principles set forth in the proposed rule. However, as Vice-Chairman Burkes recently observed, now is the time to change those rules. Western Coal Traffic League v. Union Pacific R.R., Finance Docket No. 33726 (Decision served May 12, 2000) at 11-13. Coal Shippers submit it is fundamentally unfair to make them pay for acquisition premiums and service congestion costs. Indeed, we are unaware of any other federal agency that takes this position. For example, FERC has consistently rejected pass through of acquisition premium costs to utility customers. See, e.g., Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act; Policy Statement, 61 Fed. Reg. 68,595, 68,604 (Dec. 30, 1996) (FERC "historically has not permitted rate recovery of acquisition premiums").

The STB's current treatment of the acquisition premium appears to have been influenced by its assumption that such premiums would be offset by cost reductions produced by "merger synergies." CSX Corp. -- Control and Operating Leases/Agreements -- Conrail, Inc., Finance Docket No. 33388 (Decision served July 23, 1998) at 64. However, as the Board now recognizes, such

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[11] (...continued)
Producers Traffic Ass'n, Inc. at 2; Comments of Edison Electric Institute at 6.

"synergies" have not materialized to date. The new evidence supports re-examination of this issue.

VI.

OTHER ISSUES

Most shippers join the Coal Shippers in urging the STB to (i) not allow any future mergers unless they increase competition; (ii) consider "downstream impacts" of proposed mergers; and (iii) address "3 to 2" issues and one lump issues on a case-by-case basis, without application of any presumptions that work to the disfavor of shippers seeking relief in cases raising these issues.

BNSF and CN have raised a new issue. They ask the Board to expedite consideration of what they call "issues that are directly related to railroad mergers," while leaving resolution of other issues to separate proceedings. Comments of the Burlington Northern and Santa Fe Railway Company at 1-2; Comments of Canadian National Railway Company at 4-5.

Coal Shippers object to BNSF's and CN's characterization of the "issues." Not surprisingly, BNSF and CN view duopoly issues, competition-enhancing issues, service failure compensation issues, etc. as not "merger-related issues." That is wrong. All issues raised in the Board's March 31 rulemaking notice are

"merger-related," including the issues BNSF and CN want to remove from the list.

Coal Shippers do not object if the Board decides to expedite the procedural schedule in this rulemaking proceeding, provided the Board addresses all issues raised in this expedited proceeding, not the select few chosen by BNSF and CN.

CONCLUSION

Coal Shippers request the Board to adopt and promulgate the proposed rules and policies set forth in our Opening Comments.

Respectfully submitted,

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Dated: June 5, 2000

Attachment A

PROPOSED COMPETITION-ENHANCING CONDITIONS

1. Access Relief

Coal Shippers request the Board to amend its merger rules by adopting the following access relief rule:

> The Board shall impose as a condition on any major rail consolidation transaction the following access relief:
>
> (a) Following the Board's approval of a major rail consolidation transaction, any person, including an affected shipper, may request the consolidated carrier(s) to allow a second carrier to use its or their facilities to provide competitive rail service. The carrier shall have ninety (90) days to respond to the request. If the carrier denies the request, the person may seek relief from the Board as provided in subsection (b) below.
>
> (b) Upon request of any person, including an affected shipper, and subject to the requirements of subsection (a), the Board shall require railroad facilities owned by the involved rail carrier to be used by another rail carrier if the Board finds that use will not substantially impair the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business. The Board shall establish compensation for the use of the facilities on a usage basis based upon a sharing of the total costs incurred. Total costs shall include roadway maintenance expenses, dispatching expenses, and return on and of net book investment on road property. The rail carriers are responsible for establishing the conditions for use of the facilities, except compensation. However, if the rail carriers cannot agree, the Board shall establish conditions for use of the

facilities. The compensation shall be adequately secured before a rail carrier may begin to use the facilities of another rail carrier under this section.

(c) A rail carrier whose railroad facilities are required to be used by another rail carrier under this section is entitled to recover damages from the other rail carrier for injuries sustained as the result of compliance with the requirement or for compensation for the use, or both as appropriate, in a civil action, if it is not satisfied with the conditions for use of the facilities or if the amount of the compensation is not paid promptly.

(d) The Board shall complete any proceeding under subsection (b) within 180 days after the filing of the request for relief.

2. Bottleneck Relief

Coal Shippers request the Board to amend its merger rules by adopting the following bottleneck relief rule:

The Board shall impose as a condition on any major rail consolidation transaction the following bottleneck rate relief:

(a) Following the Board's approval of a major rail consolidation transaction, upon the request of a shipper, the consolidated rail carrier(s) shall establish a rate for transportation and provide service requested by the shipper between any two points on the system of that carrier where traffic originates, terminates, or may reasonably be interchanged. A carrier shall establish a rate and provide service upon such request without regard to: (i) whether the rate established is for only part of a movement between an origin and a destination; (ii) whether the shipper has made arrangements for transportation for any other part of that

movement; or (iii) whether the shipper currently has a contract with any rail carrier for part or all of its transportation needs over the route of movement; provided, however, that if such a contract exists, the rate established by the carrier shall not apply to transportation covered by the contract.

(b) A shipper may challenge the reasonableness of any rate established by a consolidated rail carrier in accordance with subsection (a). The Board shall determine the reasonableness of the rate so challenged without regard to: (i) whether the rate established is for only part of a movement between an origin and a destination; (ii) whether the shipper has made arrangements for transportation for any other part of that movement; or (iii) whether the shipper currently has a contract with a rail carrier for any part of the rail traffic at issue, provided that the rate prescribed by the Board shall not apply to transportation covered by such a contract.

3. Paper Barrier Relief

Coal Shippers request the Board to amend its merger rules by adopting the following paper barrier relief rule:

The Board shall impose as a condition on any major rail consolidation transaction the following paper barrier relief:

(a) "Paper barriers," as used in this section, refer to the terms in agreements between (i) Class I railroads and (ii) Class II or Class III railroads ("shortlines") or non-carriers which impair or penalize the shortline's freedom to interchange traffic with carriers with which the shortline can physically connect.

(b) Following the Board's approval of a major rail consolidation transaction, any

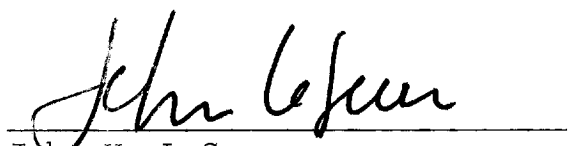
person (including an affected shipper) may request the consolidated carrier to remove one or more paper barriers. The carrier shall respond within thirty (30) days after receipt of the request. If the carrier does not grant the request, a person may institute proceedings at the Board.

(c) Upon receipt of a request, and subject to the provisions of subsection (b), the Board shall direct the consolidated carrier to remove a paper barrier unless the carrier can demonstrate that retention of the paper barrier is in the public interest. In making a public interest finding, the Board will be guided by the principles set forth in subsection (d).

(d) Paper barriers to interchange are inherently anti-competitive, and are unreasonable unless they are necessary to the achievement of a public benefit that outweighs the harm they cause to competition, and then only if they are no broader or more restrictive than necessary to achieve that benefit. There is a rebuttable presumption that a paper barrier is unreasonable insofar as it (i) lasts longer than five (5) years from the date of the agreement containing the paper barrier, or (ii) includes any financial penalty on a shortline that is triggered by the interchange of traffic with another carrier, or (iii) includes credits for traffic interchanged with a carrier against a rental or sale price that reflects a return of more than the railroad industry's cost of capital on the fair market value of the properties sold or leased. For purposes of this section, "fair market value" shall be computed without considering the revenues earned by the carrier for handling traffic originating or terminating on those properties over other parts of its system.

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June, 2000, I have served a copy of the foregoing Joint Reply Comments of Subscribing Coal Shippers on all persons designated as a Party of Record in this proceeding by postage pre-paid, first-class United States mail.



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